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No. 84-286

IN THE

Supreme Court of the United States

October Term, 1984

LOUISE KONIK, M.D.,

Petitioner,

v.

CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER, ANESTHESIA ASSOCIATES OF PLATTSBURGH, P.C., DAVID T. HANNAN, As President of Champlain Valley Physicians Hospital, and individually; MICHAEL J. MOYNIHAN, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, and individually; SALEM BAYOUMY, M.D., as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and individually; and JOHN MENUSTIK, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., and individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of Champlain Valley Physicians Hospital Medical Center; David T. Hannan, as President and Individually; Michael J. Moynihan, as Chief of Staff, and Salem Bayoumy, M.D., as Chief of the Department of Anesthesiology and Individually, in Opposition to Petition for Certiorari

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Summary of Argument.

The decision below evidences the Court of Appeals, Second Circuit's meticulous and exhaustive review of the facts and reflects a correct application of the law in a manner not in conflict with applicable decisions of this Court, or of any other Court of Appeals. There is no question of law or any issue which justifies issuance of a Writ of Certiorari.

Argument.

In brief, this case involves an anesthesiologist who, for reasons of her own, elected to voluntarily cease practicing her profession with a group with which she had been associated for years, and thereafter refused to enter into a non-exclusive, non-discriminatory contract for her services, intended, drafted and re-drafted to accommodate her and rejected by her for reasons other than the purported price fixing clause, the existence of which she now insists is the principal reason to justify certiorari.

Examination of the record evidences the fact that the petitioner still continues to advance arguments based on repeated allegations which the Courts below have examined thoroughly and found to be unsubstantiated. Contrast, for instance, the characterization of the contract by the petitioner, at pages 9, 11, 13, and 16-19 of her brief, with the opinion of Judge Kersey as to "The Nature of the Contract":

> "Konik was invited to become a party to the contract on terms that in no way discriminated against her. Defined as the 'party of the third part,' Konik was joined in lock-step with AAP, subject to precisely the same responsibilities and given precisely

> the same benefits as the anesthesiologists who were members of AAP. The contract was the culmination of many weeks of negotiations directed toward accommodation of Konik's desire to practice anesthesiology at the Hospital without being a member of AAP. Had she signed the contract, she would have been allowed to render anesthesiology services alongside the members of AAP" (Appendix A, p. 19a).

This present petition, rather than demonstrating any important federal question left unaddressed, advances arguments which seek to make this Court a re-trier of facts long since disposed of. Witness, for example, the first argument, a renewed claim of group boycott in the face of the trial court's holding that "as to the group boycott argument, there is no evidence before me to support this theory" (Appendix C, pp. 69c-70c). Note also the Circuit Court's opinion: "The evidence was insufficient to support a rational inference that the contract, offered to Konik at a parity with AAP, was designed to exclude her" (Appendix A, p. 33a).

Petitioner's second argument contends that the arrangement between the hospital and the firm of anesthesiologists constitutes an illegal tying arrangement. The Circuit Court has held: "This claim was properly dismissed because the evidence failed to establish Konik's factual premise" (Appendix A, p. 29a). Note also the analysis at Appendix A, pages 30a-31a, including the following:

> "What was missing, however, was proof that the Hospital conditioned the sale of its operating room facilities on the purchase of anesthesiology services from AAP. The record establishes rather conclusively that the Hospital did not so condition the sale

> of its operation room facilities . . . The fact that Konik has chosen not to enter into an agreement with the Hospital that would have gained her access to the operating suites, and that no other anesthesiologist has yet been admitted to the Hospital staff undoubtedly produces the practical effect that patients have only the AAP anesthesiologists from whom to choose. But that is legally insufficient in the circumstances of this case to establish that the Hospital has tied its operating facilities to the services of AAP" (Appendix A, p. 31a).

Petitioner's third argument is that the Court below condoned an "odious" anti-trust offense by finding illegal price fixing and refusing to grant injunctive relief. This is a distortion of the Court of Appeals dicta and actual finding on this point.

The District Court had found that "the quoted language (clause 3 [c] of the 1978 agreement) by itself is not evidence of price fixing" and that Konik "had proffered not a scintilla of evidence in support of her vertical price fixing theory" (Appendix C, p. 69c). The Court of Appeals, Second Circuit, stated that "the term of the contract that set maximum fees to be charged *constituted evidence of* a contractual vertical price restraint" (Appendix A, p. 36a, emphasis added).

Petitioner would convert this language into a holding that the particular contract was, in fact, a vertical price restraint, when the Court of Appeals found it unnecessary to give this further consideration and to rule on this point since the plaintiff had "failed to present any evidence from which it could rationally be inferred that she was injured

by reason of the inclusion of the price ceiling in the contract." Instead, "the trial evidence overwhelmingly showed that the presence of the price ceiling was not the reason for Konik's declining to enter into the contract with AAP and the Hospital" (Appendix A, pp. 36a-37a. Also see Appendix A, pp. 26a-28a).

Petitioner's final point, that the Court below misapplied its standard for a directed verdict by means of overreaching, challenges the judgment of the Circuit Court without contending that any unresolved federal question is presented thereby. The invalidity of these contentions is perhaps best illustrated by comparing petitioner's statement that the Court failed to give weight to the testimony of the petitioner that she refused to sign the contract because of her protest of the inclusion of a price fixing provision (petitioner's brief, p. 22) with the Circuit Court's exhaustive treatment of the subject (Appendix A, pp. 26a, 27a and 28a) during the course of which the Court stated: "The record overwhelmingly indicates that this could not have been her reason for declining to enter the contract." And, the Court continued, "most significantly, Konik's claim that she refused to sign the contract because it contained an unlawful provision placing a ceiling on the prices anesthesiologists were permitted to charge patients of the Hospital is squarely contradicted by her own contemporaneous actions and omissions" (Appendix A, p. 28a).

Conclusion.

This case was tried over a period of four weeks. The verdict of the trial court was unanimously affirmed by the Circuit Court of Appeals. Application for rehearing was unanimously denied. Request by the petitioner for a rehearing *en banc* was transmitted to the judges of the Court in regular active service and to any other judge who heard the appeal. No judge requested that a vote be taken thereon. It is respectfully submitted that the petitioner has wholly failed to sustain her burden of establishing under Rule 19 that there are special and important reasons why the Writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court or of any other Court of Appeals on the same matter.

The Court of Appeals correctly affirmed the directed verdict of the trial court.

Respectfully submitted,

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